

**BEFORE THE POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001**

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**Rules Pursuant to 39 U.S.C. 404a**

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**Docket No. RM2013-4**

**COMMENTS OF PITNEY BOWES INC.**

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## **I. INTRODUCTION**

Pursuant to Order No. 1739, Pitney Bowes Inc. (Pitney Bowes) respectfully submits these comments on the proposed rules governing complaints alleging violations of section 404a of the Postal Accountability and Enhancement Act (PAEA).<sup>1</sup>

The PAEA reconstituted the Postal Regulatory Commission and enhanced its regulatory and oversight authority. The Commission's greater oversight role furthers the increased transparency and accountability goals of the PAEA and ensures a level playing field when the Postal Service competes with the private sector. The Commission previously implemented final rules governing complaints, reporting requirements, and confidentiality; the rules to implement section 404a are an additional step in fleshing out the Commission's greater regulatory authority.

Section 404a(a) prohibits the Postal Service from: (1) establishing regulations that advantage itself competitively or otherwise harm competition; (2) compelling private entities to disclose intellectual property; and (3) using information acquired from private entities without their consent to offer a postal service. *See* 39 U.S.C. § 404a. These constraints balance the pricing flexibility and new commercial freedoms afforded to the Postal Service by the PAEA. As discussed in Order 1739, the limitations imposed under section 404a reflect Congress' concern that the Postal Service could use its unique status as both a government entity and market participant to advantage itself or disadvantage others.<sup>2</sup> *See* Order 1739 at 4-5.

Pitney Bowes supports the Commission's proposed rules and offers suggested refinements to strengthen the protections against unfair competition and to improve the

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<sup>1</sup> *See* Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006). The PAEA amends various sections of title 39 of the United States Code. Unless otherwise noted, section references in these comments are to sections of title 39.

<sup>2</sup> These concerns remain relevant today. During the July 24, 2013 business meeting of the House Oversight and Government Reform Committee to consider postal reform legislation, there was discussion regarding section 404a specifically, and several Members expressed their continuing concern about the Postal Service using its unique status as a government entity to unfairly compete with the private sector. *See* Postal Reform Act of 2013: Full Committee Business Meeting on H.R. 2748 of the House Oversight and Government Reform Comm., 113<sup>th</sup> Cong. (Jul. 24, 2013)(discussion of amendment to H.R. 2748 offered by Mr. Farenthold).

complaint process. These comments also discuss the need for effective oversight to prevent anticompetitive practices in workshare pricing.

## **II. DISCUSSION**

### **A. Substantive Provisions**

Proposed part 3032 establishes the substantive rules implementing the statutory prohibitions of section 404a.

1. The burden of proof for complaints alleging violations of section 404a(a)(1) is inconsistent with the PAEA.

Proposed subpart 3032.5 would impose a threshold burden on complainants alleging violations of section 404a(a)(1) to prove injury and competitive harm. This heightened burden of proof is inconsistent with the plain language of the PAEA and should be removed.

Section 404a(a)(1) provides:

- (a) Except as specifically authorized by law, the Postal Service may not –  
(1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;”

39 U.S.C. § 404a(a)(1).

Section 404a(a)(1) prohibits the Postal Service from establishing any regulation that establishes the terms of competition or creates an unfair competitive advantage for the Postal Service *unless the Postal Service* demonstrates that the regulation does not harm competition. Congress assigned the burden of proof to the Postal Service, not the complainant. A complainant alleging a violation of section 404a(a)(1) should be able to state a *prima facie* case merely by showing that the Postal Service has established a rule or regulation that establishes the

terms of competition. It is then up to the Postal Service to demonstrate why the regulation should be allowed to stand. Proposed subpart 3032.5 has it backward.

The Commission stated that it looked to the Federal Communication Commission's (FCC) program access rules, *see* 47 C.F.R. §§ 76.1000 *et seq.*, in developing the substantive provisions implementing section 404a(a)(1). *See* Order 1739 at 6. Yet the heightened burden proposed in subpart 3032.5 is inconsistent with those rules as well. The FCC's program access rules do not impose a threshold burden on complainants seeking to challenge the specific unfair practices enumerated in the Cable Television Consumer Protection and Competition Act of 1992. *See* 47 U.S.C. § 548; 47 C.F.R. §§ 1002, 1003(c). Under the program access rules, specific unfair practices are treated as *per se* violations because Congress presumed injury to competition. *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 F.C.C.R. 1902, 1928-1930 (Dec. 9, 1994). In implementing its program access rules the FCC stated:

Congress did not intend to place a threshold burden . . . to show either specific or generalized harm to competition in those circumstances specifically prescribed in subsection (c) . . . if behavior meets the definitions of the activities prescribed in subsection (c), such practices are implicitly harmful.

*Id.*, at 1928 (citations omitted).<sup>3</sup> Section 404a commands the same result.

The Commission's proposed adoption of the burden shifting framework of the "rule of reason" analysis is unnecessary and inappropriate. *See* Order 1739 at 7-9. In the antitrust context the court must determine "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition . . . The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare,

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<sup>3</sup> The FCC program rules impose a heightened burden only for generalized claims of unfair practices brought under 47 U.S.C. § 548(b). *See* 47 C.F.R. § 1001. Those claims that are analogous to complaints filed under section 403(c), not section 404a, of the PAEA.

and competitive acts, which increase it.” *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001). Section 404a obviates the need for the Commission to devise such a rule. Congress has already determined that the activities proscribed in section 404a are harmful.

The relevant history of section 404a confirms this reading. Section 404a first appeared in the 106<sup>th</sup> Congress in H.R. 22. *See* Postal Modernization Act of 1999. H.R. 22, 106th Cong. (1st Sess. 1999). The H.R. 22 version has no provision for the Postal Service to demonstrate that a rule that established the terms of competition did not create an unfair advantage. *See* H.R. 22, 106th Cong. § 305 (1999). Subsequent iterations of this provision expressly assign the burden to the Postal Service to demonstrate that any rule establishing the terms of competition does not create an unfair advantage for the Postal Service or any entity funded by the Postal Service. *See* H.R. 4970, 107<sup>th</sup> Cong. (2d Sess. 2002); S. 1285, 108<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2003); S. 2468, 108<sup>th</sup> Cong. (2d Sess. 2004); H.R. 4341, 108<sup>th</sup> Cong. (2d Sess. 2004); H.R. 22, 109<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2005); S. 662, 109<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2005); H.R. 6407, 109<sup>th</sup> Cong. (2d Sess. 2006). As enacted section 404a imposes an affirmative duty on the Postal Service to prove why such regulations should not be deemed *per se* unlawful.

Section 404a(a)(1) creates a rebuttable presumption. Any rule or regulation that the Postal Service creates that establishes the terms of competition is presumed harmful and, thus, prohibited *unless the Postal Service* demonstrates otherwise. The implementing rules must recognize this. To be consistent with the underlying statute the Commission should revise subpart 3032.5(a) to remove the threshold burden on the complainant to show injury and harm to competition.

2. The Commission should provide additional guidance regarding *per se* violations of section 404a(a)(1).

The proposed rules implementing section 404a(a)(1) could also be improved by including additional guidance on actions that would be deemed *per se* violations. The Commission can not predict every possible scenario that could give rise to a potential complaint, but certain issues are foreseeable and could be addressed in advance to give all parties clear guidance. For example, the rules should state that it is a *per se* violation for the Postal Service to offer a “free” product or service in an established market absent a showing that the product can be offered at zero marginal cost. As another example, the rules could state that it is a *per se* violation for the Postal Service to compete in markets it regulates. In those circumstances where the competitive harm is self-evident (predatory or exclusionary pricing) or the risk of abuse and of unfair competition is simply too great (regulate / compete), clear advance guidance in the rules would further the intent of section 404a and avoid the time and expense of future litigation.

3. The Postal Service’s general and specific authorities are conditioned by section 404a.

Proposed subpart 3032.8 sets forth the Postal Service’s statutory affirmative defense that alleged violations of section 404a are justified because its actions are authorized by law. The proposed rules make clear that this affirmative defense is available to alleged violations of section 404a(a)(1), (2), (3). The proposed rules state, however, that “[a]uthority under 39 U.S.C. 401 or 39 U.S.C. 404 may not form the basis of an affirmative defense under . . . this section.” *See* Order 1739 at 28. This is an important limitation. The Postal Service’s statutory general and specific powers under sections 401 and 404 are expressly limited by the prohibitions of section 404a. *See* 39 U.S.C. §§ 401 and 404.

4. The substantive rules of part 3032 define key terms consistent with the purpose of section 404a.

Pitney Bowes agrees that it would be inappropriate to allow the Postal Service to evade the limitations of section 404a merely by labeling its actions something other than a rule or regulation. *See* Order 1739 at 8. In fact, a broad application of the phrase “rule or regulation (including any standard)” is required. The use of “including” is not limiting and the “any standard” language is expansive and illustrative.<sup>4</sup> The rules, thus, correctly apply to “other documents or policies.” Similarly, the definitions of the terms “intellectual property” and “disclosure, transfer, or licensing of intellectual property” in proposed subpart 3032.6(b)-(c), and the definition of informed consent in proposed subpart 3032.7(c) are consistent with the scope and intent of section 404a.

**B. Procedural Provisions**

Proposed part 3033 establishes the procedural rules governing complaints alleging violations of section 404a. The proposed rules complement the existing complaint rules and add two new features: (1) the option of accelerated procedures for complaints alleging violations of section 404a and (2) the use of depositions as a discovery tool in non-accelerated section 404a complaint procedures. Pitney Bowes supports both of these proposals.

The Commission notes that the use of the optional accelerated procedures may impose some additional burden in view of the lack of discovery and the resources that may be required to meet condensed time frames. *See* Order 1739 at 13. But these burdens must be balanced with the benefit of prompt resolution of the issues. And in many cases the accelerated procedures may help reduce the costs of prosecuting a complaint. The complainant is in the best position to

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<sup>4</sup> Congress knows how to close a set. Had Congress intended to limit the command of the section to only rules, regulations, or standards, it would have said “rules, regulations, or standards.”

assess their particular claim and to determine the appropriate balance of that trade-off. If the complainant does not elect to use the accelerated procedures of part 3033, the existing rules under part 3030 of the Commission's rules will apply.

The proposal to allow the use of depositions in non-accelerated complaints alleging violations of section 404a is also an improvement to the existing rules. The use of depositions is not required, but rather is permitted if the complainant feels the use of a deposition would facilitate the exchange of information more efficiently.

As discussed in connection with proposed subpart 3032.15, depositions can serve as a valuable discovery tool by promoting efficiency, expedition, and in narrowing the issues in dispute. *See* Order 1739 at 14, 17-18. These benefits apply to all complaints. The Commission states that it anticipates section 404a complaints will "involve a limited number of participants." *Id.* at 18. This may be true in some cases, but not others. To guard against potential abuse, the scope and number of depositions can be negotiated and managed as they are in matters proceeding in federal court. Accordingly, the use of depositions as a discovery tool should be made available in all complaints under part 3030.

### **C. The Proposed Rules Highlight the Importance of the Commission's Role in Regulating Anticompetitive Practices in Other Areas**

The Commission's increased oversight responsibilities extend beyond its section 404a responsibilities to other potentially anticompetitive practices of the Postal Service. One area of particular concern is workshare pricing for market dominant products.

Order 1739 discusses the policy considerations and unfair competition principles developed in connection with the FCC's experience with vertically integrated telecommunications firms. *See* Order 1739 at 6-7. The same policy concerns apply in the context of postal pricing because workshare discounts determine the terms of access to the

vertically integrated postal delivery network. The Postal Service has a statutory monopoly over downstream delivery services and monopsony power over upstream workshare services for market dominant products. *See* PRC Dkt. No. ACR2011, Comments of John Panzar (Feb. 3, 2012) at 8 (Panzar Comments) (discussing competition policy concerns and comparing the telecommunications and postal sectors (“In contrast, no amount of presorting could result in the provision of a useful final product. Presorting mailers were completely dependent upon the delivery arm of the Postal Service as a partner in the provision of an economically valuable service.”)).

Workshare discounts set below 100 percent of avoided costs have two negative outcomes. First, as the Commission has observed repeatedly, setting workshare discounts below avoided costs will exclude equally or more efficient upstream suppliers.<sup>5</sup> This results in productive and allocative inefficiency and fails to minimize the total combined costs of the postal system. Second, workshare discounts less than avoided costs are exclusionary and anticompetitive. *See* Panzar Comments at 14.

Setting workshare discounts below avoided costs is an abuse of the Postal Service’s pricing power because it harms competition and reduces consumer welfare. Workshare discount policies for market dominant products warrant special concern because the Postal Service’s actions in this area are statutorily exempt from antitrust law and the scrutiny of other competition regulators. And under the price cap regime established under the PAEA, the USPS now has a

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<sup>5</sup> *See e.g.*, Dkt. No. RM2012-6, Order No. 1753 (Jun. 18, 2013) at 17 (“the purpose of limiting workshare discounts to the amount of Postal Service costs that the mailer’s worksharing avoids is to provide an economically efficient price signal to the mailer—one that will encourage the mailer to perform worksharing only when it is the least-cost producer.”); Dkt. No. R2006-1, Opinion and Recommended Decision (Feb. 26, 2007), at ¶ 4031 (quoting witness Panzar, “the promotion of postal sector productive efficiency, the reduction of the Postal Service’s end-to-end costs, and lower postal rates for mail users is a policy objective worth pursuing.” (citations omitted)).

profit motive which may give it an incentive to reduce worksharing discounts.<sup>6</sup> *See id.* at 13-14.

It is the Commission's responsibility to prevent anticompetitive behavior in workshare pricing for market dominant products. The Commission should embrace this responsibility. It should use its expanded regulatory authority to carefully scrutinize discounts set below avoided costs. It should also revisit, pursuant to its authority under sections 3622(a) and 3622(d)(3), the system for regulating rates to require that workshare discounts be set (wherever practicable) at 100 percent of avoided costs. *See id.*, at 14-17.

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<sup>6</sup> *See United States Postal Service Strategic Transformation Plan 2006-1010* (Dec. 2007) at 1 ("The Postal Act of 2006 introduced several changes affecting how postal services are designed, priced, and marketed. For the first time in its history, the Postal Service can make a profit and invest earnings back into the business.").

### **III. CONCLUSION**

Pitney Bowes respectfully requests that the Commission revise its proposed rules to incorporate the suggested changes proposed above. Incorporation of these refinements will strengthen the protections against unfair competition and improve the Commission's complaint processes. Pitney Bowes urges the Commission to review and revisit the need for effective oversight to prevent anticompetitive practices in workshare pricing.

Respectfully submitted:

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